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No. 91-1354

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CHEROKEE NATION OF OKLAHOMA,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF THE PETITIONER

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ARGUMENT

1. The Petitioner has satisfied the requirement established in *Aleut Community of St. Paul Island v. United States*, 480 F.2d 831 (Ct. Cl. 1973), that a fair and honorable dealings claim under section 2(5) of the Indian Claims Commission Act of 1946, 60 Stat. 1049 (ICCA), be based on a special relationship between the Petitioner and the United States. To reach their contrary conclusion, both the Court of Appeals and the Respondent misstate the requirements for a fair and honorable dealings claim.

The decision in *Aleut* is based on three legal events, the Treaty of March 30, 1867 (15 Stat. 539), in which Russia ceded Alaska to the United States, and two statutes that were enacted after cession to regulate the fur seal trade. Act of July 1, 1870, 16 Stat. 180, and Act of

April 21, 1910, 36 Stat. 326. There was never a treaty between the Aleuts and the United States, the United States never recognized any Aleut claim of title to land, and the statutes merely gave the Secretaries of the Treasury and Commerce and Labor authority to furnish food and shelter and otherwise provide for the welfare of the Aleuts. "This authority was permissive only and not obligatory and amounted to nothing more than a provision for the possible furnishing of gratuities to the natives." 480 F.2d at 843 (Skelton, J., concurring in part and dissenting in part). That authority had a practical, commercial purpose, not one that bespoke a special or fiduciary relationship.

Under Russian sovereignty, the Aleuts had been reduced to serfs in the fur trade because their aboriginal expertise in culling, killing, and dressing fur seals was essential to the economic success of the trade. 480 F.2d at 836; *see also* H.R. Exec. Docs. Nos. 129, 136, 144, 41st Cong. 2d Sess. (1870); H.R. Exec. Doc. No. 20, 42d Cong., 2d Sess. (1871). In restricting the Aleuts' aboriginal use of the seal herd for the benefit of the commercial industry, the United States decided to provide for the minimum needs of the Aleuts so they would remain a viable work force for the fur trade.

The Petitioner's relationship to the United States is far more substantial than that in *Aleut* in terms of its foundation for a fair and honorable dealings claim. In *Aleut*, the Court of Claims found a special relationship existed even though the United States had no bilateral relations whatsoever with the Aleuts. In contrast, and as set forth in the Petition, the United States made numerous treaties with the Petitioner in order to secure territory for non-Indian settlement. The United States recognized Petitioner's title and sovereignty over vast territories in the east, including governmental and proprietary control over waterways. Eventually, the United States induced the Petitioner to give up its rights in the eastern territory and embark on the Trail of Tears in ex-

change for treaty-based sovereignty and fee patent title to 14 million acres of land in Oklahoma, including the bed of the Arkansas River. The riverbed lands were later placed in trust by an act of Congress which provided that they "shall not become public lands nor property of the United States." Pet. App. 86a. All of these actions establish a special relationship within the meaning of *Aleut* regarding the navigational servitude. This special relationship is the fiduciary relationship with the Petitioner in which the United States, as trustee of the Arkansas Riverbed lands, administers them for the use and benefit of its Indian ward, the Petitioner.

2. The Respondent argues that the fair and honorable dealings claim in this case can be established only if the Petitioner first shows that "the United States specifically promised the Tribe that it would not exercise" the navigational servitude. Respondent's Br. 7. Such a showing is not required under the ICCA and, in any event, would be impossible to make under the facts of this case.

The showing is not required because the ICCA's fair and honorable dealings clause expressly waives legal defenses by authorizing claims that are not based on any existing rule of law or equity. *Creek Nation v. United States*, 168 Ct. Cl. 483, 496 (1964). It makes no sense to require a claimant under that clause to prove a specific waiver of the navigational servitude defense when that same clause generally waives all legal defenses. Any other conclusion would make the fair and honorable dealings cause of action meaningless.

In the first section of this Reply and in its Petition, the Petitioner believes that it has demonstrated the existence of a special relationship with the Respondent under the rule in *Aleut*. All that the Petitioner then should be required to show is that the Respondent breached that relationship and damaged the Petitioner by reserving and exercising the navigational servitude. The Petitioner contends that the Respondent's reserva-

tion and exercise of the servitude were unfair and dishonorable in the context of this case because they are inconsistent with the representations made by the Respondent at the time of the conveyance of the riverbed and the expectations engendered in the Petitioner thereby.

It is impossible for the Petitioner to show an intention by the Respondent to waive the navigational servitude. The doctrine that the Respondent's authority over navigation includes the power to take land under navigable waterways in aid of interstate commerce without compensation was not announced by this Court until the end of the 19th century. Petition at 15-16. Thus, in the first half of the 19th century, when the Respondent and Petitioner made their bargain and exchange, neither party was aware of the servitude.

The Respondent's opposition to the Petition is based in part on *Confederated Tribes of the Colville Reservation v. United States*, 20 Cl. Ct. 31, 50 (1990). The reasoning in *Colville* and the Respondent's reliance on it are mistaken. *Colville* errs by requiring a claimant to establish that Congress intended *in the enactment of the ICCA* specifically to waive the legal defense of the navigational servitude. No case establishing liability under fair and honorable dealings has required proof that the United States promised to refrain from employing a legal defense. In addition, the proof of a special relationship under the rule of *Aleut*, *supra*, is to be found in *the historical record of the relationship* between the United States and the Petitioner regarding the conveyance of the riverbed, not in the legislative history of the ICCA.

Moreover, the Court of Appeals, the Respondent, and the Claims Court in the 1990 *Colville* decision fail to address the Indian Claims Commission's ruling almost 15 years ago that rejected Respondent's attempt to invoke its power over navigable waters to defeat a fair and honorable dealings claim. In *Confederated Tribes of the Colville Reservation v. United States*, Docket 181-C, 43

Ind. Cl. Comm. 505 (1978), the Tribes claimed that construction of Grand Coulee Dam on the Columbia River destroyed their anadromous fishery in violation of the fair and honorable dealings clause. The United States attempted to defeat the claim by arguing that "it is settled law that ownership of the waters, their uses, and possession, remain in the sovereign, for the benefit of the public as a whole" and there is a strong presumption against the disposition of the sovereign's ownership of navigable waters. Defendant's Brief on Fisheries Claim at 2-12, *Confederated Tribes, supra* (No. 181-C). The Indian Claims Commission ruled that the defense was unavailing and awarded compensation to the Tribes:

> Defendant's final argument is that the evidence does not establish any intent on the part of the defendant to grant to the claimants compensable fishing rights in the navigable waters adjacent to the Colville Reservation. A grant of such rights is not the basis of the plaintiffs claim, but rather the Government's obligation to deal fairly and honorably with claimants concerning the right to fish which had been indulged in from time immemorial by the claimants. *The most that can be said for Government's argument is that absent clause (5) of section 2 of the 1946 Indian Claims Commission Act, such a right would not be compensable.*

(Emphasis added) 43 Ind. Cl. Comm. at 532-33. The United States did not appeal that decision.

Thus, the Indian Claims Commission concluded in the 1978 *Colville* decision that to prevail in a fair and honorable dealings cause of action, a claimant is not required to prove that the United States in some way had expressly waived any of its legal rights, including the navigational servitude. Similarly, the obligation to deal fairly and honorably with the Petitioner's riverbed title was not, and cannot be, preconditioned on an express agreement by the Respondent to waive its power over navigation. In sum, the fair and honorable dealings cause of action does

not permit the use of a legal defense against a claim based on fairness, honor and morality. *Creek Nation, supra.*

3. The Respondent misstates the historical record when it describes the Petitioner as sharing regulatory authority over the Arkansas River. Respondent's Br. 7. There is no evidence that any power sharing occurred. The record is one of consistent deference by the Respondent to the Petitioner's governmental and proprietary interest. That record provides ample basis for the Petitioner to have concluded and expected that there was no reservation of any power akin to the navigational servitude when the Respondent conveyed the riverbed to the Petitioner. Accordingly, the events surrounding the conveyance "must be interpreted as the Indians would have understood them, and any doubtful expressions in them should be resolved in the Indians' favor." *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) (citations omitted).

Nothing in this argument is intended to suggest that a reservation of the servitude did not occur as a matter of law. That issue was resolved in *United States v. Cherokee Nation of Oklahoma*, 480 U.S. 700 (1987). But that ruling leaves unanswered the question whether the Respondent's reservation and later exercise of the servitude without compensation to the Petitioner was unfair and dishonorable. That is the question which this Court is being asked to review.

4. Finally, the Respondent sweeps aside the remainder of the Petition by insisting that the Petitioner has not established a special relationship related to the construction of the Arkansas River Navigation Project. The Respondent's presumptive dismissal of those elements of the Petition does not justify its failure to address them. Rather than being beside the point, those elements of the Petition are integral to the determination of what constitutes fairness and honor when an implied constitutional

power comes into conflict with a congressionally established remedy that is not amenable to defenses under existing rules of law or equity.

CONCLUSION

Respondent's opposition is not well-founded. Accordingly the petition for a writ of certiorari should be granted.

Respectfully submitted,

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